"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections, not equipped with appliances provided for in said sections, to-wit: all cars must be equipped with * * * efficient hand brakes. * * *"

STATEMENT OF THE CASE.

Respondent's answer admits that this action arises under the Federal Employers Liability Act and the Federal Safety Appliance Act (3a, 5a).

Petitioner, in the performance of his duty, put his head out of a window in the caboose of a 153-car westbound train. The caboose was the hindmost piece of equipment.

It was a dark and misty night (42a).

He was struck by a flying object while his head was out of the window (33a). He fell back unconscious into the caboose. The window closed after him, from his left to his right (80a). He received a laceration 1½ to 2 inches long on his right forehead, just above his eye. He remained unconscious for a period variously estimated from one-half hour to one and one-quarter hours.

A search of the caboose failed to reveal any object which may have struck him (82a).

There were tracks to the north of where petitioner was injured (43a). No trains were moving on those tracks at that time (43a).

There were no close clearances in the area (43a).

Other than the men in the caboose and such men of the crew who were up front, there apparently was no person in the vicinity (87a).

Frequently he was asked what hit him and he answered that he did not know.

On December 13, 1956, eight days after he was hurt, he was interviewed at a hospital by respondent's investigator accompanied by a reporter. On this occasion petitioner stated in effect that he did not know what hit him.

Then he was asked these questions and he made these answers:

> "Q. What is your idea as to what caused this? Do you think you bumped yourself against the side of the caboose or something hit you?
>
> A. Something definitely hit me.
>
> Q. Do you have any idea what it was?
>
> A. Do you want my idea?
>
> Q. Your opinion.
>
> A. I think it was part of a brake shoe that ricocheted off the rail and hit me." (92a.)

On January 24 or 25, 1957, approximately fifty days after he was injured, petitioner, while at a hospital, told a railroad doctor there that he suddenly remembered that it was a piece of a brake shoe which had hit him.

At trial, plaintiff testified that just before the caboose entered a straight stretch of track, he saw sparks flying from the leading trucks of the second hind car, or the trailing trucks of the third hind car. This meant there was something wrong with those particular cars. To get a better look he leaned out slightly further. An object flew out from the "region of the wheels where the sparks were flying," ricocheted on the adjoining parallel track, and hit him (32a, 33a).

Just before the object hit him, he testified at trial, he observed that it was a piece of a brake shoe about 2 inches long, 2 inches wide, and ½ inch thick (53a).

He exercised no control with respect to the area from which the object flew out.

In the area from which the object flew out, there were quite a number of parts (49a, 75a).

He readily admitted that up until January 24 or 25, some fifty days after he was hurt, he repeatedly had stated that he did not know what it was that hit him (63a, 64a).

He remembered the occasion when he was interviewed on December 13, 1956. He did not remember any of the specific questions which were put to him or the answers which he gave, but he did not question the correctness of what was reported as the questions put and the answers given on that occasion.

Before summation, petitioner requested in writing that the trial court charge that the doctrine of res ipsa loquitur applied, if the jury found by a fair preponderance of all of the evidence of the case that something which was part of the train and was under the exclusive control of the respondent, and with respect to which the petitioner exercised no control, struck and injured him.

This request was rejected.

Counsel for petitioner, accordingly, confined summation to the matter of absolute liability under the Safety Appliance Act.

After deliberating for some considerable time, the jury returned with this question:

> "If we find the Railroad not negligent can we still award damages to Mr. Masterson for the reason he was injured while an employee of the Railroad and they should be held responsible for his injury?"

The trial court stated:

> "I want to say I am very disappointed that you ask the question, because it seems to me you haven't paid any attention to the charge of the court or the argument of counsel." (118a)

The trial court then instructed the jury again that if it believed petitioner's identification of the object as a

piece of a brake shoe, he was entitled to a verdict. Otherwise, its verdict was to be for the respondent.

The jury then returned a verdict for respondent and judgment was entered upon that verdict.

Petitioner duly filed his motion for new trial. This was denied in a written memorandum.

The Court of Appeals for the Third Circuit affirmed and adopted the views of the trial court that the request to charge res ipsa loquitur was correctly refused because inconsistent with the allegations in the complaint as well as inconsistent with the position taken by plaintiff and his counsel throughout the trial and because not warranted by the evidence introduced during the trial.

Federal jurisdiction in the court of first instance is predicated upon the Federal Employers Liability Act and the Federal Safety Appliance Act.

ARGUMENT.

The Court of Appeals in this case decided an important question of federal law which specifically has not been but should be settled by this court and it has decided a federal question in a way in conflict with the philosophy of decisions of this Court.

In the Record, after all the testimony had been received, there was an evidentiary basis for the conclusion that the object which struck petitioner flew out from an area of the train under respondent's exclusive control and was either a piece of a brake shoe or something other than a piece of a brake shoe.

The dark, misty night, and the very short lapse of time between the instant the object flew out from the train and the instant it struck petitioner, made identification difficult.

Petitioner's "idea" or "opinion" expressed eight days after the occurrence may have blossomed into an honest, though wrong, belief forty-two days later.

Petitioner's admissions that for approximately fifty days after the occurrence, he had stated repeatedly that he did not know just what it was which struck him, furnished respondent with a strong argument against acceptance of his testimony that it was a piece of a brake shoe which hit him.

It is fundamental that a jury may believe all or any part of the testimony of any witness.

The jury, accordingly, could believe petitioner's testimony that the object came from a part of the train under exclusive control of respondent though the jury reject his testimony that the object was a piece of a brake shoe.

Petitioner's request to charge on res ipsa was consistent with his testimony anent the physical conditions which obtained at the time of the occurrence, his testimony anent exclusive control in the respondent in the area from which the object which struck him flew out, his admission that eight days after the occurrence he stated that it was only his "opinion" that what struck him was part of a brake shoe, and his admission that for some fifty days after the occurrence he had stated repeatedly that he did not know what struck him.

We submit that the fact that petitioner testified as to his belief anent identification of the object which struck him, permitting recovery under the Safety Appliance Act, should not necessarily foreclose his right to go to the jury under the doctrine of res ipsa loquitur, where there exists in the Record an evidentiary basis for submission to the jury of the issue of negligence under such doctrine.

The trial court and the Court of Appeals in the case at bar have decided that a railroad man, bringing his action

under the Federal Employers' Liability Act and the Federal Safety Appliance Act, is limited to the Safety Appliance Act claim even though the Record is such as presents an evidentiary basis for the application of res ipsa loquitur.

Respondent's position is that *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U. S. 384; 70 S. Ct. 200, sustains this view.

We submit respectfully that *O'Donnell* does no such thing.

O'Donnell is authority for the proposition that where the thing causing the injury is shown to be covered under the Safety Appliance Act, to show negligence with respect to such thing is to add nothing to the direct case under the Safety Appliance Act.

Thus, in the case at bar, were the thing which injured petitioner, without question, a part of a brake shoe, it would add nothing to his case under the Safety Appliance Act, to show that respondent was negligent with respect to such brake shoe.

At the risk of unwarranted repetition, we reiterate plaintiff's position that in the state of the Record in this case, the jury could well have found that the thing which caused injury was not a part of a brake shoe (thus eliminating a Safety Appliance Act violation) but that nevertheless it was, indeed, a part in the exclusive control of respondent, which detached from the train and caused plaintiff's injury.

In this situation, the doctrine of *O'Donnell* would be wholly inapropos, and the res ipsa loquitur doctrine with its attendant negligence concept would, indeed, become apropos.

The view of the courts below in this case is in conflict with the expression of this Court in *Rogers v. Mo.*

P. R. R. Co., 352 U. S. 500; 1 L. Ed. 2d 493, where this Court clearly stated:

> "The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought * * * whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury."

The view of the courts below is in conflict with *Jesionowski v. B. & M. R. R.*, 329 U. S. 452, where it was held that whether the railroad was in exclusive control of the factors which may have caused the accident was for the jury to decide, and that once the jury, appropriately instructed, found the railroad to be in such an exclusive control, the jury was authorized to find negligence from the fact that the accident occurred.

The jury, in the case at bar, had a right to believe that the flying object came from a part of the train under respondent's control, and though the object was not a piece of a brake shoe, respondent was negligent under the res ipsa loquitur doctrine.

At pre-trial there was some discussion between counsel and the Court dealing with the Safety Appliance Act aspects of the case.

The discussion brought no definitive agreement on the matter of res ipsa loquitur.

At that time, neither petitioner nor his counsel knew that in the interview of December 13, 1955, petitioner had ventured the "opinion" that the object which struck him was a piece of a brake shoe.

Respondent used this testimony to argue forcibly that petitioner's testimony on trial was, in fact, only the fulfillment of an idea which had grown into a belief.

The investigator for the railroad who testified at great length with respect to the statement made by petitioner eight days after the accident was an effective witness, and his testimony unrefuted could well have had great weight with the jury.

Near the end of discussion at pre-trial anent res ipsa loquitur the trial court observed that

> "If he is looking out that car window and he is hurt by a flying object, I think it is up to the railroad to explain. I think he can get to the jury under F. E. L. A." (22a.)

Counsel for respondent, at that juncture, broke in with an irrelevant reference to a witness, and then the Court concluded the discussion anent the matter of res ipsa loquitur, with this observation:

> "That depends on testimony. You can't rule on that in advance." (22a.)

When the trial court rejected a charge on res ipsa he did not mention any understanding reached at pre-trial with respect to this matter. The colloquy on this subject is as follows:

> "The Court: As I see that, gentlemen, the res ipsa doctrine is merely a doctrine of evidence, that permits an inference of negligence. It is just a question of evidence. In this case we don't have any evidence of anything other than the brake shoe.
>
> Mr. Illig: That's right.
>
> The Court: It might be it was a piece of iron, broken spring. I don't know what all might have come out of there. But this fellow doesn't put it that way. If he equivocated, and said it came from there, but I am not sure whether it is a brake shoe or what it was, we would have a different thing. He says brake shoe period.
>
> Mr. Illig: As a practical matter, is the jury going to draw any distinction?" (103a.)

Would not the trial court have reminded petitioner's counsel at the time he presented the rejected request to charge that such request was inconsistent with his position on pre-trial had any definitive position been reached at pre-trial on that score?

Assuming arguendo that petitioner's counsel was of the impression that as matters stood at the time of pre-trial, he would prefer to go to the jury on the Safety Appliance Act phase of the case, would petitioner thereby be precluded from amending his position prior to trial?

At the time of pre-trial, petitioner's counsel had not yet obtained the transcript of the interview on December 13, 1956, between petitioner and McKinley, defendant's agent.

Were a situation to develop which would prompt petitioner's counsel to change his views as expressed at pre-trial with respect to the theory of liability, would it not be in the interest of fairness and justice to give petitioner an opportunity to avail himself of the change in thinking on that subject prior to trial?

Respondent could not be prejudiced in any way, shape, manner, or form by any such change, if any were made.

The Request for Charge Was Not Inconsistent with the Allegations in the Complaint.

The second paragraph of the complaint recites that the

"Instant action arises under and by virtue of the Federal Employers Liability Act * * * and the Federal Safety Appliance Act. * * *"

The third paragraph alleges

"* * * suddenly a part of a brake shoe on one of the cars of said train broke. * * *"

The fourth paragraph of the complaint recites:

"As a direct result of the unlawful conduct and the negligence of the defendant, he sustained * * * injury. * * *"

Paragraph 2 of the complaint, therefore, invoked both the Federal Employer's Liability Act and the Safety Appliance Act.

The third paragraph set forth the operative facts which would bring the action within the purview of the Safety Appliance Act.

The fourth paragraph refers not alone to the violation of laws set forth in the third paragraph, but also to "negligence," which has nothing to do with an action under the Safety Appliance Act but is the sine qua non of the right to recover under the Federal Employers Liability Act.

Rule 8f of the Federal Rules of Civil Procedure, reads:

All pleadings shall be so construed as to do substantial justice.

Courts should construe pleadings to give "effect to all its averments." *Barron and Holtzoff, Federal Practice and Procedure*, § 283, p. 536.

Vigor v. Chesapeake & O. Ry. Co., 101 F. 2d 865 (7th Cir. 1939), cert. denied, 307 U. S. 635 (1939), was a Federal Employers Liability Act-Safety Appliance Act case. The question was raised in that case whether or not the complaint was based upon negligence besides the Safety Appliance Act. The court stated:

"It must be conceded that the pleading is not a model one for that purpose, and that it more perfectly states a cause of action for violation of the statute. However, it alleges that the injury was caused by reason of the negligence and carelessness of the defendant in interstate commerce. It was not necessary to allege

negligence or carelessness in a suit based upon a violation of the statute, and appellant was therefore put upon notice that appellee was relying upon negligence and carelessness whether they were properly pleaded or not. Of course, it is not proper to plead different theories in the same paragraph, but it is not necessarily fatal especially when the adversary makes no objection. Here appellant raised no objection to the form or content of the complaint by demurrer or motion, and we think it is in no position to object after going to trial on the general issue." 101 F. 2d 865 at 869.

If indeed, therefore, pleadings are to be construed "as to do substantial justice" and all averments of the complaint shall be given affect, it is respectfully submitted that the complaint did, in fact, raise the issue of respondent's negligence and that the doctrine of res ipsa loquitur as a rule of evidence allowing the jury to infer negligence, is not inconsistent with or at all repugnant to the complaint.

Petitioner Was Denied the Fair Trial to Which He Was Entitled by the Obvious Lack of Understanding of the Issue submitted as Reflected in the Jury's Question.

The jury, in the case at bar, was confined by the court's charge to a consideration only of the absolute duty concept of the Safety Appliance Act.

The charge of the Court, as given, was consistent with the trial court's refusal to charge on res ipsa loquitur.

The summation of counsel for petitioner, therefore, omitted any discussion of the matter of negligence.

Despite the summation and the charge of the court, the jury, after deliberating for some time, came back with this question:

"If we find the railroad not negligent, can we still award damages to Mr. Masterson for the reason he was injured while an employee of the railroad and they should be held responsible for his injury." (R. 4.)

The court's response was:

"You have presented a question for further instruction. I want to say I am very disappointed that you ask the question, because *it seems to me you haven't paid any attention to the charge of the court or the argument of counsel.*" (Emphasis supplied.) (118.)

"I think it is clear to you, should have been clear to you, that this case was founded or left on the basis of the violation of the Safety Appliance Act, and any causal relation of that of the injury. That is if the brake shoe came off the trucks, as testified to by the plaintiff, if you accept that statement, accept his evidence, he is entitled to a verdict. It isn't a question of negligence in this case. I think that was made very clear. I thought I made that clear to you."

Out of the hearing of the jury, the court, after reading the question to counsel, added:

"That is rather discouraging to the court after all the charge, and especially the summation." (119a.)

It is plain that the jury was inattentive to the summation of counsel. For a substantial period of time, obviously, the jury had concerned itself with its own concept of negligence.

Petitioner's counsel had refrained from arguing the matter of negligence, because it was not in the case as submitted by the court.

Some one or more persons on that jury had directed consideration of the case to "negligence." This without benefit of a court's instructions, and without listening to

argument by counsel with respect thereto, and without any knowledge of the doctrine of res ipsa loquitur which would have permitted an inference of negligence to be drawn from the very happening of the occurrence.

Did the court's statement to the jury in response to the question asked by it cure the wrong committed by the jury?

We submit that it did not.

The jury had considered the case on the basis of its own concept of "negligence," without guiding instructions or argument pertinent to that subject.

For the court to express to the jury disappointment at its question, to tell the jury that it had paid no "attention to the charge of the court or the argument of counsel," understandably uttered, could well have evoked a measure of belligerence on the part of the jury. A rap on the knuckles sometimes galvanizes already formulated ideas into stubbornness. This is not a climate calculated to induce fairness and justice.

The court's admonition and further instruction certainly did not correct the jury's inattentiveness to the summation. No opportunity for further summation was, or in the very nature of things, could have been afforded.

It cannot be said that the ends of justice are served in a Federal Safety Appliance Act case where the jury reveals its failure to grasp even an iota of understanding of the philosophy of that Act, and where, in fact, it reveals that it has given consideration to decisive factors which are alien to the Act.

The trial court, in his memorandum overruling motion for a new trial, interpreted the question of the jury as evidence only of its consideration of a point on which it was uninstructed, in effect, a bit of surplusage.

This effort to rationalize his action in denying the motion does not stand the test of logic, or of reason. The view expressed by the court is inconsistent with his immediate reaction to the question posed by the jury. His view on motion for new trial is unreasonably strained and unwarranted by the plain language used by the jury.

The question indicates clearly that the jury did not consider the issue in the light of the Safety Appliance Act, but in the light of its own brand of "negligence," without the benefit of proper and pertinent instructions and argument thereon.

We submit that when the court stated, "It seems to me you haven't paid any attention to the charge of court or the argument of counsel," it recognized that the jury had not considered the case on the basis of the Safety Appliance Act.

Plaintiff, who has devoted practically all of his adult work life thus far to the defendant railroad, can find no solace in pious expressions that the Federal Employers Liability Act and Safety Appliance Act was designed for his protection, and that it is to be liberally construed in his favor as he ponders the fact that such purposes were thrown to the four winds.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

SAMUEL T. GAINES,
Counsel for Petitioner.

Of Counsel:

BERNSTEEN, BERNSTEEN & GAINES.

APPENDIX.

Opinion of the United States Court of Appeals for the Third Circuit.

(Filed May 5, 1959.)

The only important question on this appeal is whether the request to charge res ipsa loquitur should have been granted.

Our own examination of the record completely satisfies us that Judge Willson correctly held in his opinion on the motion for a new trial that "The request for charge was refused because inconsistent with the allegations in the Complaint as well as inconsistent with the position taken by plaintiff and his experienced and able counsel throughout the trial and finally because not warranted by the evidence introduced during the trial."

The judgment of the District Court will be affirmed.

Judgment of the United States Court of Appeals for the Third Circuit.

(Filed May 5, 1959.)

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.